BRIGHT RIMS MANUFACTURING SDN BHD

v.

VICTOR TAICHUNG MACHINERY WORKS CO LTD & ANOR

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD GHAZALI YUSOFF JCA
ARIFFIN JAKA JCA
[CIVIL APPEAL NO: W-02-779-2003]
29 MAY 2007

CIVIL PROCEDURE: *Injunction - Mareva injunction - Principles applicable - Action premised upon malicious prosecution - Special and general damages - Whether there was a real risk of assets being dissipated or removed - Balance of convenience - Whether appellate interference warranted*

The appellant, a locally incorporated company, filed this instant action in the High Court on 5 March 2003, premised upon malicious prosecution, against the 1st respondent, a foreign company incorporated in Taiwan which had a local address for service, and the 2nd respondent, a locally incorporated company whose place of business bore the same address as the local address for service of the 1st respondent. It was the appellant's claim that as a result of certain actions by the 1st and 2nd respondents arising out of another civil suit ('D5 suit') wherein the appellant was named as one of the defendants, its reputation had been harmed, its credit seriously damaged and its business transactions hampered and, hence, it had suffered loss and damage. In the D5 suit, the 1st respondent presented a petition in the High Court ('said petition') to wind up the appellant based upon a summary judgment ('said summary judgment') that it had obtained against the appellant. Subsequently, premised upon a motion filed by the appellant to strike out the said petition, the learned High Court Judge ('Judge') ordered that the appellant's motion be allowed and that the said petition be "struck off". In this instant action, the appellant was claiming special damages totalling RM1,540,000 and the sum of the RM6 million as general damages and/or aggravated damages, interest and costs. On 21 March 2003, the appellant filed an *ex parte* application for a

A Mareva injunction against the 1st respondent (encl. 7) praying that an injunction be granted restraining the 1st respondent from removing from the jurisdiction, disposing of or otherwise dealing with in any manner the sum of RM1,540,450 within the jurisdiction until the *inter partes* hearing of the application. The B learned Judicial Commissioner ('JC') in the court below dismissed encl. 7 resulting in the present appeal by the appellant.

Held (dismissing the appeal)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the C court:

(1) In the circumstances of this case, the 1st respondent had every right to file the said petition to wind up the appellant based upon the said summary judgment awarded against the appellant. The said summary judgment was clearly a final D judgment. As such, the appellant's stand as per its memorandum of appeal that the learned JC failed to appreciate that the appellant had a strong arguable case to claim for damages against the 1st respondent following the "dismissal" of the said petition could not be fathomed. The order of the E learned Judge clearly stated that the said petition was "struck off" and not "dismissed". In furtherance to the above, there were no merits in the ground advanced by the appellant in its memorandum of appeal that the learned JC failed to consider adequately that the said petition, even if it were to be F subsequently dismissed as being ill-founded, could damage the reputation of the appellant as a solvent company. The appellant would be entitled to damages if it could prove at the trial of the instant action that there was indeed malicious prosecution on the part of the 1st respondent in presenting G the said petition, but until the instant action was heard on its merits, the learned JC would not be able to determine at this interlocutory stage that the presentation of the said petition was from its very nature calculated to injure the credit of the appellant, thus entitling it to damages for pecuniary loss or H special damages or loss of business. (paras 50 & 51)

(2) It could not be disputed that the appellant had every right to file this instant action premised on malicious prosecution and in relation to this, the appellant had taken the correct I approach as had been established from the authorities, namely,

that any action for damages against a petitioner, whose petition for winding up has been struck out, can be brought by an entirely separate suit founded on the tort of malicious prosecution. However, the issue of how much loss had been suffered could only be determined at the trial. In this application for a Mareva injunction, the sum the appellant was asking the court to injunct was RM1,540,450. With regard to this amount, the appellant had failed to produce any evidence at all to prove that it had suffered loss amounting to RM1,590,450 *ie*, the purported expenses for advertisements and its legal costs in opposing the said petition. As such, it would only tantamount to being a bare allegation. The fact that this loss was claimed as special damages would suggest that the appellant should have all the necessary evidence to prove this amount but the appellant failed to illustrate this when it pursued this application. Further, the 1st respondent was right in its argument that the appellant had no right to unilaterally claim RM50,000 as its legal costs when this legal costs had yet to be taxed by the court. (para 52)

(3) The appellant's argument that, unless restrained, there was a real danger that the 1st respondent, being a foreign company, would remove the said judgment sum from the jurisdiction and this would render nugatory any order which the court may order against the 1st respondent, had no merit as the appellant had not shown that there was a risk that the assets of the 1st respondent, including the judgment sum, would be dissipated. (para 54)

(4) Upon careful perusal of the appeal record and the grounds of decision of the learned JC, it was clear that she had taken into consideration all the facts and the legal principles involved in an application for a Mareva injunction. She had weighed all the relevant factors and had come to the conclusion that the balance of convenience lay in favour of refusing the Mareva injunction. She had exercised her discretion judiciously and in accordance with settled principles in dismissing this application for a Mareva injunction, and there was nothing to suggest that she had committed an error of law or had misconceived the facts. As such, there was no reason for this court to interfere. (para 56)

A ***Bahasa Malaysia*** *translation of headnotes*

Pada 5 Mac 2003, perayu, sebuah syarikat tempatan, telah memfail tindakan pendakwaan niat-jahat di Mahkamah Tinggi terhadap responden pertama, sebuah syarikat asing yang didaftar
B di Taiwan tetapi mempunyai alamat penyampaian tempatan, dan terhadap responden kedua, sebuah syarikat tempatan yang mempunyai alamat niaga yang sama seperti alamat penyampaian tempatan responden pertama. Tuntutan perayu adalah bahawa, disebabkan oleh tindakan responden pertama dan kedua dalam
C satu guaman lain ('Guaman D5') di mana ia telah dinamakan sebagai defendan, reputasi, namabaik serta halehwal perniagaannya telah tercemar dan terjejas sekaligus menyebabkan ia mengalami kehilangan dan kerugian. Di dalam Guaman D5, responden pertama telah mengemukakan petisyen ke Mahkamah Tinggi
D ('petisyen tersebut') bagi menggulung perayu berdasarkan satu penghakiman terus (penghakiman terus tersebut') yang diperolehi terhadap perayu. Berikutnya, ekoran usul yang dikemukakan perayu untuk membatalkan petisyen tersebut, yang arif hakim Mahkamah Tinggi ('hakim') membuat perintah membenarkan usul dan
E "membatalkan" petisyen tersebut. Dalam tindakan di sini, perayu menuntut gantirugi khas berjumlah RM1,540,000 serta RM6 juta sebagai gantirugi am dan/atau gantirugi teruk, faedah dan kos. Pada 21 Mac 2003, perayu memfail permohonan *ex parte* untuk injunksi Mareva terhadap responden pertama (lampiran 7) memohon
F supaya suatu injunksi diberi bagi menghalang responden pertama dari mengalih keluar dari bidangkuasa, melupuskan atau berurusan dengan apa cara sekalipun wang yang berada di dalam bidangkuasa berjumlah RM1,540,450 sehinggalah permohonan didengar secara *inter partes*. Yang arif Pesuruhjaya Kehakiman ('PK') di mahkamah
G di bawah menolak lampiran 7 dan perayu merayu terhadap keputusan tersebut.

Diputuskan (menolak rayuan)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:
H

(1) Dalam halkeadaan kes di sini, responden pertama mempunyai segala hak untuk memfailkan petisyen tersebut untuk menggulung perayu berdasarkan penghakiman terus tersebut yang diawardkan terhadap perayu. Jelas, penghakiman terus
I tersebut adalah satu penghakiman yang muktamad. Oleh itu, pendirian perayu seperti yang terserlah pada memorandum

rayuannya bahawa yang arif PK gagal melihat bahawa perayu mempunyai kes yang kukuh untuk menuntut gantirugi terhadap responden pertama ekoran "penolakan" petisyen tersebut sukar diterima. Perintah yang arif hakim menyatakan dengan jelas bahawa petisyen tersebut telah "dibatalkan" dan bukannya "ditolak". Selanjutnya, tidak ada merit pada alasan yang dibangkitkan perayu dalam memorandum rayuannya bahawa yang arif PK gagal menimbang secukupnya bahawa petisyen tersebut, jikapun ia kemudiannya ditolak kerana ketiadaan asas, masih boleh menjejaskan namabaik perayu sebagai sebuah syarikat yang solven. Perayu berhak kepada gantirugi jika ia mampu membuktikan di perbicaraan tindakan semasa bahawa memang wujud pendakwaan niat-jahat oleh responden pertama dalam mengemukakan petisyen tersebut, namun, sehingga tindakan semasa didengar di atas merit, yang arif PK tidaklah berupaya untuk menentukan di peringkat interlokutori ini sama ada pengemukaan petisyen tersebut adalah pada pada asasnya bertujuan untuk merosakkan namabaik perayu, sekaligus mewajarkan pemberian gantirugi kerana kehilangan kewangan atau gantirugi khas atau gantirugi kerana kehilangan peluang perniagaan kepadanya.

(2) Tidak dinafikan bahawa perayu mempunyai segala hak untuk memfail tindakan semasa berasaskan kepada pendakwaan niat-jahat dan sehubungan dengan ini, perayu telah mengambil pendekatan yang betul dan selaras dengan autoriti-autoriti, yakni di mana petisyen untuk penggulungan telah dibatalkan, tindakan gantirugi terhadap pempetisyen boleh diambil melalui satu guaman berasingan berasaskan kepada tort pendakwaan niat-jahat. Bagaimanapun, isu mengenai tahap kerugian yang ditanggung hanya boleh ditentukan di perbicaraan. Dalam permohonan untuk injunksi Mareva di sini, jumlah yang dipohon perayu supaya dihalang oleh mahkamah adalah RM1,540,450. Bagaimanapun, berhubung jumlah ini, perayu sama sekali gagal membuktikan bahawa ia mengalami kerugian berjumlah RM1,590,450, iaitu jumlah yang dikata dibelanjakan untuk iklan dan kos guaman bagi menentang petisyen tersebut. Oleh yang demikian, ia adalah satu alegasi kosong semata-mata. Fakta bahawa kerugian ini dituntut sebagai kerugian khas seolah-olah menunjukkan bahawa perayu mempunyai segala bukti perlu bagi membuktikan jumlah tersebut, namun hakikatnya jumlah itu gagal dibuktikan oleh perayu. Selain itu,

responden pertama betul dalam hujahnya bahawa perayu tidak berhak untuk menuntut RM50,000 sebagai kos guaman secara sebelah pihak kerana kos guaman masih belum ditaksirkan oleh mahkamah.

(3) Hujah perayu bahawa terdapat bahaya sebenar bahawa responden, sebagai sebuah syarikat asing, jika tidak dihalang, akan mengalih jumlah penghakiman tersebut keluar dari bidangkuasa sekaligus akan menjadikan sia-sia apa-apa perintah yang mungkin dibuat oleh mahkamah terhadap responden, adalah tidak bermerit oleh kerana perayu tidak membuktikan bahawa terdapat risiko bahawa aset-aset responden pertama, termasuk jumlah penghakiman, akan dilupuskan.

(4) Meneliti dengan cermat rekod rayuan dan alasan-alasan penghakiman yang arif PK, jelas bahawa beliau telah mempertimbang semua fakta dan prinsip undang-undang yang terbabit dalam suatu permohonan injunksi Mareva. Beliau telah menimbang semua faktor-faktor relevan dan telah mencapai konklusi bahawa neraca keselesaan berpihak kepada menolak injunksi Mareva. Beliau juga, dalam menolak permohonan injunksi Mareva, telah melaksanakan budibicaranya dengan penuh kehakiman dan menurut prinsip-prinsip yang sudah diterimapakai, dan tiada apapun yang menunjukkan bahawa beliau telah melakukan kesilapan undang-undang atau telah tersalah mengerti fakta-fakta. Oleh itu, tiada alasan bagi mahkamah ini untuk mengganggu keputusannya.

Case(s) referred to:

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***

QIW Retailers Ltd v. Felview Pty Ltd & Anor [1989] 7 ACLC 510 ***(refd)***

S & F International Limited v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***

Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 3 CLJ 657 FC ***(refd)***

Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 CA ***(refd)***

For the appellant - Zainur Zakaria (Philip MC Choong with him); M/s Philip Choong & Co

For the respondent - Sulaiman Abdullah (K Goik with him); M/s Nasir, Kenzin & Tan

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D6-22-338-2003]

Reported by Suresh Nathan

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] On 5 March 2003 the appellant, a locally incorporated company named Bright Rims Manufacturing Sdn Bhd filed this instant action in the High Court, Kuala Lumpur, premised upon malicious prosecution, against the 1st respondent, a foreign company incorporated in Taiwan named Victor Taichung Machinery Works Co Ltd and which has a local address for service and the 2nd respondent, a locally incorporated company named Victor Machinery (M) Sdn Bhd and which place of business bear the same address as the local address for service of the 1st respondent.

[2] It is the appellant's claim that as a result of certain actions by the 1st and 2nd respondents arising out of another civil suit, namely, Kuala Lumpur High Court Civil Suit No. D5-22-425-96 (hereafter referred to as "the D5 suit") wherein the appellant was named as one of the defendants, its reputation has been harmed, its credit seriously damaged and its business transactions hampered and hence has suffered loss and damage.

[3] In this instant action the appellant is claiming special damages totalling RM1,540,000 and the sum of RM6 million as general damages and/or aggravated damages, interest and costs.

[4] On 21 March 2003, the appellant filed an *ex parte* application for Mareva injunction against the 1st respondent (encl. 7) praying for the following orders:

(i) that the 1st respondent by themselves, their servants or agents or otherwise be restrained, and an injunction be granted restraining the 1st respondent from removing from jurisdiction, disposing of or otherwise dealing with in any manner a sum of RM1,540,450 within the jurisdiction until the inter-partes hearing of the application on a date to be fixed or until further order;

(ii) that the costs of the application be borne by the 1st respondent.

[5] Enclosure 7 was heard by the learned Judicial Commissioner (JC) in the court below on an inter-partes basis on 1 August 2003 and on 19 August 2003 was dismissed with costs. The appellant appealed to this court.

[6] We unanimously dismissed the appeal with costs and ordered the deposit to be remitted to the 1st respondent towards the account of taxed costs. The following are our reasons for doing so.

[7] It is the appellant's contention at the outset that the 2nd respondent was at all material times the servant and/or agent and/or nominee of the 1st respondent in Malaysia and that the actions and/or omissions of the 2nd respondent were in fact the actions and/or omissions of the 1st respondent; further and in the alternative, wherever the appellant attributes certain actions and/or omissions to the 1st respondent, it is its contention that these were also the acts and/or omissions of the 2nd respondent.

[8] A perusal of the statement of claim filed by the appellant in this instant action would show the background and as to what transpired in the D5 suit.

The D5 Suit

[9] The D5 suit was filed on 25 June 1996. In that suit, the 1st respondent (as plaintiff) sued the appellant and another for the sum of US$205,000 in respect of goods sold and delivered. The goods were 2 units of machinery (hereafter referred to as "the said machinery").

[10] In its defence, the appellant (as the 1st defendant) admitted that the said machinery were delivered but contended there was late delivery amounting to 44 days and that the said machinery were not in working order and were defective. The appellant (as the 1st defendant) then counter-claimed for the sum of RM990,000 as a result of loss in productivity it suffered as the said machinery could not be utilised.

[11] On 21 April 1997, Haidar Mohd Noor J (as he then was) awarded summary judgment in the D5 suit to the 1st respondent (as plaintiff) for the sum of US$205,000 together with interest thereon at the rate of 8% per annum from 19 May 1995 until realisation and costs (hereafter referred to as "the said summary

judgment"). Haidar Mohd Noor J also allowed a stay of execution of the said summary judgment until the hearing and disposal of the appellant's (as the 1st defendant) counterclaim.

[12] On 4 September 1998, Steve LK Shim J (as he then was) dismissed the appellant's (as the 1st defendant) counterclaim. On 30 September 1998, the appellant (as the 1st defendant) appealed to this court against the dismissal of its counterclaim (hereafter referred to as "the counterclaim appeal").

[13] Subsequently, on 3 February 1999, Steve LK Shim J granted a stay of execution on the said summary judgment until the hearing and disposal of the counterclaim appeal by this court (hereafter referred to as "the said stay of execution order").

[14] Meanwhile, on 21 September 1998 the 1st respondent (as plaintiff) issued a notice under s. 218 of the Companies Act 1965 to the appellant (as the 1st defendant).

[15] On 18 April 2000, this court allowed the counterclaim appeal by the appellant (as the 1st defendant) with costs here and below and ordered that the senior assistant registrar of the High Court assess damages, if any, suffered by the appellant (as the 1st defendant) premised upon a 14 days delay, as agreed, in delivery of the said machinery.

[16] On 3 July 2000, the Federal Court dismissed the 1st respondent's (as plaintiff) application for leave to appeal.

The Instant Action

[17] In this instant action, the appellant contend that the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) "extends to and encompasses" the assessment by the senior assistant registrar of the High Court of damages suffered by the appellant "on the counterclaim and appeals until such matters are finally determined" and "taxation of costs of the Court of Appeal and the High Court payable" by the 1st respondent to the appellant pursuant to said order of this court dated 18 April 2000.

[18] In furtherance to the above contention, the appellant aver that on 17 August 2000 the 1st respondent, by falsely representing to be the appellant's judgment creditor, maliciously and/or without reasonable or probable cause and/or in abuse of

process, presented a petition in the High Court at Kuala Lumpur (Companies Petition No. D2-28-708-2000) (hereafter referred to as "the said petition") to wind up the appellant on the grounds that it was unable or deemed unable to pay its debts, namely, the judgment sum granted under the said summary judgment (granted by Haidar Mohd Noor J on 21 April 1997).

[19] The appellant contend that the 1st respondent was aware that at the time of presentation of the said petition, ie, on 17 August 2000, the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) was subsisting, preventing all execution proceedings on the said summary judgment. Further, the senior assistant registrar of the High Court has yet to assess damages arising from the order of this court on the counterclaim appeal and that costs payable by the 1st respondent pursuant to the same order of this court have yet to be taxed or set off against the said summary judgment.

[20] The appellant further contend that the 1st respondent has not been candid in alleging in the said petition that the appellant was unable to pay its debts whereas it was well aware that the appellant "is and was financially sound and well able to pay the judgment sum" in the said summary judgment. The 1st respondent itself disclosed in the said petition that the appellant has "a paid up capital or credited as paid of RM9,791,176".

[21] The appellant then pointed out that the 1st respondent has failed to withdraw the said petition notwithstanding that the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) was brought to their attention in the appellant's affidavit filed in opposition to the said petition and also in an application to strike out the said petition. Further, the 1st respondent had also "falsely and maliciously and without reasonable or probable cause and/or in abuse of process" caused the said petition to be advertised in newspapers.

[22] By reason of the presentation of the said petition the appellant's bank accounts were frozen and its credibility with its banks, suppliers and customers was seriously affected. Further, the presentation and advertisement of the said petition negated a sum of approximately RM1,490,450 expended by the appellant on advertisement of its products marketed over the period 1999 and 2000.

[23] The appellant then stated that on 16 October 2001 the High Court ordered that the said petition be struck off with costs payable to the appellant whereupon the whole proceedings were wholly determined in favour of the appellant. Subsequent to the striking out of the said petition, the 1st respondent maliciously and/or in abuse of legal process continued with execution proceedings on the said summary judgment in the D5 suit and that the 1st respondent and/or a servant of the 2nd respondent purporting to act on behalf of 1st respondent caused a writ of seizure and sale dated 9 November 2001 (hereafter referred to as "the said writ of seizure and sale in the D5 suit") to be filed.

[24] The appellant contend that the 1st respondent was not entitled to file and/or execute on the said writ of seizure and sale in the D5 suit as the said stay of execution order (granted by Steve LK Shim J on 3 February 1999) was still subsisting and that the assessment of damages on the counterclaim pursuant to the order of this court dated 18 April 2000 was not then finally determined by the senior assistant registrar of the High Court.

[25] On 3 October 2001, the senior assistant registrar of the High Court assessed damages on the counterclaim to the value of RM472,214.40.

[26] On 5 October 2001, the 1st respondent filed an appeal to the judge in chambers against the assessment of damages by the senior assistant registrar. It is the contention of the appellant that the 1st respondent failed to take into account interest on the sum of RM472,214.40 at the rate of 8% interest per annum from 18 April 2000 to 9 November 2001 amounting to RM59,098.50. Further, the costs of this court and the High Court payable by the 1st respondent to the appellant pursuant to the order of this court dated 18 April 2000 have not been taxed and set off against the judgment sum awarded in the said summary judgment.

[27] The appellant contend that the sum of RM709,979 appearing in the said writ of seizure and sale in the D5 suit is unlawful, exorbitant and or unconscionable; it was computed based on the judgment sum of US$205,000 on an erroneous exchange rate of US$1 to RM3.80 whereas the exchange rate then was US$1 to RM2.50.

[28] The appellant also contend that in the said writ of seizure and sale in the D5 suit, the 1st respondent had "deliberately suppressed" the fact that it is a foreign entity "residing outside the Schedule Territories within the meaning of the Exchange Control Act 1953". Further, the 1st respondent is not registered as a foreign company in Malaysia and has no place of business within the jurisdiction of the High Court; its misrepresentation as to its place of business, *viz.*, the same address as that of the 2nd respondent's place of business "is a deliberate attempt to circumvent the provisions of the Exchange Control Act 1953 and the Rules of the High Court and is an abuse of legal process".

[29] The appellant then pointed out that on 21 January 2002, the 1st respondent withdrew or abandoned the execution of the said writ of seizure and sale in the D5 suit upon the appellant's undertaking to deposit the sum of RM709,979.40 with the appellant's then solicitors subject to certain conditions.

[30] Subsequently, on 20 February 2002, the appellant filed an application to strike out and/or set aside the said writ of seizure and sale in the D5 suit (encl. 7 in the D5 suit).

[31] On 4 March 2002, the 1st respondent filed an application to amend the praecipe to the said writ of seizure and sale in the D5 suit to take into account the following:

(a) the decision of the learned judge of the High Court in reducing the award of damages on the appellant's counterclaim in the D5 suit to RM34,000;

(b) the change in the address of the 1st respondent to an address out of the jurisdiction; and

(c) the letter of approval from the Controller of Foreign Exchange.

[32] On 30 May 2002, the appellant's application to strike out or set aside the said writ of seizure and sale in the D5 suit (encl. 7) was dismissed by the senior assistant registrar of the High Court with costs and on the same day, the senior assistant registrar allowed the 1st respondent's application to amend the said writ of seizure and sale in the D5 suit (encl. 11).

[33] The appellant appealed against both decisions to the learned judge of the High Court. On 15 October 2002, the learned judge of the High Court dismissed both appeals. The appellant then appealed to this court and these appeals in relation to encls. (7) and (11) in the D5 suit are still pending.

[34] Meanwhile, the 1st respondent and/or a servant of the 2nd respondent filed an amended writ of seizure and sale in the D5 suit dated 12 June 2002 (hereafter referred to as "the amended writ of sale and seizure in the D5 suit") and subsequently continued with execution proceedings on the said summary judgment against the appellant. In relation to this, the appellant contend that the 1st respondent was not entitled to file and/or execute the amended writ of seizure and sale in the D5 suit for the following reasons:

(a) the said stay of execution order (dated 3 February 1999 granted by Steve LK Shim J) was still subsisting, preventing the 1st respondent from carrying out all execution proceedings on the judgment sum obtained under the said summary judgment;

(b) the assessment of damages on the appellant's counterclaim pursuant to the order of this court dated 18 April 2000 have not been finally determined; further, on 29 March 2002, the learned judge of the High Court reduced the award of damages on the counterclaim to the value of RM34,000.00 and on 29 April 2002, the appellant appealed to this court against that decision;

(c) the costs of this court and the High Court payable by the 1st respondent pursuant to the order of this court dated 18 April 2000 have not been taxed and set off against the judgment sum obtained under the said summary judgment;

(d) the sums claimed by the 1st respondent in the said Amended writ of seizure and sale in the D5 suit is unlawful, exorbitant and/or unconscionable; the said sum of RM709,979 was based on the judgment sum of US$205,000, obtained under the said summary judgment, converted to RM779,000 at the exchange rate of US$1 to RM3.80 at the date of filing of the amended writ of seizure and sale in the D5 suit on 12 June 2002 as opposed to the rate of exchange of US$1 to RM2.50

as at the date of the summary judgment on 21 April 1997; on the basis of the exchange rate of RM2.50 on 21 April 1997, the judgment sum of US$205,000 obtained under the said summary judgment amounts to RM512,500; and

(e) the said writ of seizure and sale in the D5 suit was suspended or abandoned by the 1st respondent on 21 January 2002; the appellant contend that there is no legal basis for the 1st respondent to amend the said writ of sale and seizure in the D5 suit which, having been abandoned, could not be reissued or amended.

[35] Further and/or alternatively, the 1st respondent and/or the 2nd respondent, purporting to act on behalf of the 1st respondent continued with the abuse of process and/or malicious prosecution of the said amended writ of seizure and sale in the D5 suit. On 30 October 2002, the 1st respondent through its solicitors together with the bailiff of the High Court, proceeded to carry out execution of the said amended writ of seizure and sale in the D5 suit at the appellant's business premise. In relation to this, the appellant pointed out the following:

(a) on 30 October 2000, the learned judge of the High Court granted a stay of execution of the said amended writ of seizure and sale in the D5 suit up to the hearing and disposal of the appellant's application for stay and further ordered that the sum of RM790,087.60 be deposited by the appellant into court;

(b) on 11 November 2002, the appellant deposited the sum of RM790,087.60 into court;

(c) on 21 November 2002, the learned judge of the High Court in the said action dismissed the appellant's application for stay with costs; and

(d) on 27 November 2002, this court allowed a stay of all execution on the judgment sum obtained under the said summary judgment to the extent of RM470,000 pending disposal of the appeal to this court on the question of damages on the appellant's counterclaim (Civil Appeal No. W-02-335-2002); this court further ordered costs of and occasioned by the application before this court for stay be costs in Civil Appeal No. W-02-335-2002.

[36] By reason of the matters aforesaid, the appellant contend that its reputation "has been harmed, its credit seriously damaged, its business transaction hampered and it has suffered loss and damage". A

[37] The appellant further contend that its turnover and profits for the year ending 31 December 2000 declined significantly. Its turnover in trading of RM78,620.000 and the net profit of RM19,800,000 after tax as at 31 December 1999 fell to a turnover of RM50,258,000 and a net profit of RM8,342.000 as at 31 December 2000. It has also suffered damages totalling RM1,540,450, namely: B C

(a) legal costs in opposing the said petition and in attending to the notice of motion to set aside the said petition which amounted to RM50,000; and D

(b) costs of advertisement incurred over the period 1999 and 2000 which were "negated by the malicious presentation and publication" of the said petition which amounted to RM1,490,450. E

[38] Thus, what is clear is that in this instant action which is premised upon malicious prosecution, the appellant (as plaintiff) is claiming special damages totalling RM1,540,450 and the sum of RM6 million as general damages and/or aggravated damages, interest and costs. The 1st and 2nd respondents filed a joint defence dated 26 May 2003 disputing the appellant's claim. The instant action has yet to be heard. F

Mareva Injunction (encl. 7)

[39] On 21 March 2003, the appellant filed encl. 7, *viz.*, the *ex parte* application in this instant action for a Mareva injunction praying for the following orders: G

(i) that the 1st respondent by themselves, their servants or agents or otherwise be restrained, and an injunction be granted restraining the 1st respondent from removing from jurisdiction, disposing of or otherwise dealing with in any manner a sum of RM1,540,450 within the jurisdiction until the inter-partes hearing of encl. 7 on a date to be fixed or until further order; and H I

(ii) that the costs of the application be borne by the 1st respondent.

[40] Enclosure 7 came up for hearing before the learned JC on 1 August 2003 and it was heard on an *inter partes* basis. It was then adjourned for decision to 19 August 2003. On 19 August 2003, the learned JC dismissed the application with costs. The appellant appealed to this court. As mentioned earlier, it was our unanimous decision that the appeal be dismissed with costs.

Decision Of The High Court

[41] In her grounds of decision, the learned JC, in relation to Mareva injunctions, made reference to *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 and *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 CLJ 552. She then said that in applying for a Mareva injunction an applicant must show to the court the following:

(i) that he had a good arguable case;

(ii) that the party against whom the injunction is applied for has assets within the jurisdiction; and

(iii) that there was a real risk of the assets being dissipated or removed before judgment.

[42] The learned JC noted that the appellant's claim against the 1st respondent was based upon malicious prosecution and in relation to this referred to *QIW Retailers Ltd v. Felview Pty Ltd & Anor* [1989] 7 ACLC 510, a decision of the Supreme Court of Queensland. In that case, the plaintiff brought an action against the defendants for damages for malicious prosecution and for abuse of process. It was held therein that in an action for malicious prosecution, a plaintiff has to prove the following:

(i) that proceedings have been maliciously instituted or continued against him;

(ii) that they have terminated in his favour;

(iii) that the proceedings are so brought or continued without reasonable and probable cause; and

(iv) that some injury or damage has been sustained by him in consequence.

[43] In her grounds of decision, the learned JC was of the view that the appellant failed to show the following:

(i) that the proceedings, *viz.*, the said petition and the said writ of seizure and sale in the D5 suit was decided in the appellant's favour;

(ii) that the 1st respondent brought or continued the proceedings in the D5 suit without reasonable and probable cause; and

(iii) that 1st respondent has maliciously instituted the proceedings.

[44] In relation to the above, the learned JC noted that it was not disputed that said petition was struck off on 16 October 2001 but there is nothing to show that it was struck off on the ground that the said stay of execution order granted by Steve LK Shim J on 3 February 1999 was still in force. As for the proceedings itself, ie, the said petition and the said writ of seizure and sale in the D5 suit, she was of the view that the 1st respondent was entitled to pursue the same on the basis that the said stay of execution abates when this court disposed off the counterclaim appeal by the appellant on 18 April 2000.

[45] The learned JC was also of the view that notwithstanding that the 1st respondent was a foreign company, the appellant has failed to show there was a real risk of the 1st respondent's assets being dissipated or removed before this instant action is disposed off.

[46] The learned JC then concluded that the application for Mareva injunction by the appellant was an abuse of process of the court and that it was more akin to an application for security for costs and hence dismissed the same.

Judgment Of This Court

[47] It would be appropriate to mention here that in his submission at the hearing of this appeal, learned counsel for the 1st respondent informed us that the appellant's appeal against the decision of the learned JC, which reduced the damages awarded by the senior assistant registrar from RM472,214 to RM34,000 for the loss suffered by the appellant on the 14 days delay in delivery, *viz.*, the counterclaim, has been dismissed by this court on 23 June 2004.

[48] In *S & F International Limited v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280, the Federal Court held that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. In delivering the judgment of the Federal Court, Abdoolcader FJ said:

> It might perhaps be convenient at this stage to concisely perpend the principles and policy underlying a Mareva order elucidated in a chain of related cases of which we need only refer to three. In *PCW (Underwriting Agencies) Ltd v. Dixon & Anor* [1983] 2 All ER 158; CA [1983] 2 All ER 697 which sets out the policy underlying the Mareva jurisdiction, it was held that the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. This decision of Lloyd, J, went on appeal to the Court of Appeal ([1983] 2 All ER 697) which however did not deliver a judgment but by consent allowed the appeal and varied the judge's order, but the principles enunciated by Lloyd, J, were unaffected by the consensual variation made in the light of the factual circumstances of that case. The English Court of Appeal has also held in *Campbell Mussells & Ors v. Thompson & Anor* The Times dated May 30, 1984, that a Mareva injunction was never intended to put a plaintiff in the position of a secured creditor and every case had to be dealt with on its own merits.
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> Mustill, J, held in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 on appeal to CA [1984] 1 All ER at p 413; [1983] 1 WLR 1412 that: (1) Before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty per cent chance of success; (2) Before such relief is granted the plaintiff

must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, eg, that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice; (3) In reaching its conclusion, the court should take into account the defendant's evidence as well as the plaintiff's. The English Court of Appeal in dismissing an appeal by the plaintiffs in that case ([1983] 1 WLR 1412; [1984] 1 All ER at page 413) restated the principles of Mareva applications and held that the jurisdiction to grant Mareva injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, *inter alia*, to show, on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.

We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently: *Duport Steels Ltd v. Sirs* [1980] 1 WLR 142; *Hadmor Productions Ltd v. Hamilton* [1983] AC 191, 220; *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] 1 AC 130. These decisions of the House of Lords were referred to and applied by the English Court of Appeal in *Ninemia Maritime Corporation* [1983] 1 WLR at p 1421; [1984] 1 All ER at p 418 where Kerr, LJ, in delivering the judgment of the court stated that recent decisions of the House have emphasised the importance of appellate courts resisting the temptation to interfere with the exercise of judicial discretions other than in limited circumstances.

[49] We would find it appropriate that the following chronology of events be reiterated in dealing with this appeal, namely:

(i) on 21 April 1997, Haidar Mohd Noor J awarded summary judgment in the D5 suit to the 1st respondent (as plaintiff); he also allowed a stay of execution of the said summary judgment until the hearing and disposal of the appellant's (as the 1st defendant) counterclaim by the High Court;

A (ii) on 4 September 1998, Steve LK Shim J dismissed the appellant's (as the 1st defendant) counterclaim;

(iii) on 3 February 1999, Steve LK Shim J granted a stay of execution on the said summary judgment until the disposal by
B the Court of Appeal of the appellant's (as the 1st defendant) counterclaim appeal;

(iv) on 18 April 2000 this court allowed the counterclaim appeal and ordered the High Court to assess damages premised upon a 14 days delay in delivery of the said machinery; this event,
C to us, would denote that the stay of execution order granted on 3 February 1999 by Steve LK Shim J abates or has lapsed under the circumstances;

(v) on 17 August 2000 the 1st respondent presented the said
D petition to wind up the appellant premised upon the summary judgment it obtained against the appellant;

(vi) on 16 October 2001, premised upon a motion filed by the appellant to strike out the said petition, Zainun Ali J ordered
E that the appellant's motion be allowed with costs and that the said petition "be struck off" (p. 543 of the appeal record) which, to us, would denote that the said petition was not heard on its merits; we would like to mention here that we have not been enlightened as to reasons why the said petition
F was struck off by Zainun Ali J.

[50] At the hearing of this appeal, learned counsel for the appellant concede that the stay of execution order granted on 3 February 1999 by Steve LK Shim J "dissolved" when this court,
G on 18 April 2000, allowed the counterclaim appeal. Under these circumstances, we are of the view that the 1st respondent had every right to file the said petition on 17 August 2000 to wind up the appellant based upon the said summary judgment awarded against the appellant by Haidar Mohd Noor J on 21 April 1997.
H The said summary judgment was clearly a final judgment. As such we cannot fathom the stand of the appellant as per its memorandum of appeal that the learned JC failed to appreciate that the appellant has "a strong arguable case to claim for damages against the 1st respondent following the "dismissal" of the
I said petition. The order of Zainun Ali J clearly state that the said petition was "struck off" and not "dismissed".

[51] In furtherance to the above, we cannot see any merits in the ground advanced by the appellant in its memorandum of appeal that the learned JC failed to consider adequately that the said petition, even if subsequently dismissed as being ill-founded, could damage the reputation of the appellant as a solvent company. We do appreciate that the appellant would be entitled to damages if it can prove at the trial of the instant action that there was indeed malicious prosecution on the part of the 1st respondent in presenting the said petition, but until the instant action is heard on its merits, we cannot see how the learned JC can determine at this interlocutory stage that the presentation of the said petition was from its very nature calculated to injure the credit of the appellant thus entitling it damages for pecuniary loss or special damages or loss of business.

[52] It cannot be disputed that the appellant has every right to file this instant action premised on malicious prosecution and in relation to this we are of the view that the appellant took the correct approach as has been established from authorities, namely, that any action for damages against a petitioner, whose petition for winding up has been struck out can be brought by an entirely separate suit founded on a tort of malicious prosecution (see *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* [1996] 3 CLJ 657). However, the issue of how much loss has been suffered can only be determined at the trial. In this application for Mareva injunction, the sum that the appellant is asking the court to injunct is RM1,540,450. With regards to this amount, we would agree with the view of the learned JC and also the argument advanced by learned counsel for the 1st respondent at this appeal that the appellant failed to produce any evidence at all to prove that they had suffered loss of RM1,490,450, ie, the purported expenses for advertisements and its legal costs in opposing the said petition. As such, it would only tantamount to being a bare allegation. The fact that this loss is claimed as special damages would suggest that the appellant should have all the necessary evidence to prove this amount but they failed to illustrate this when they pursued this application. Further, we would also agree with the argument canvassed by learned counsel for the 1st respondent that the appellant has no right to unilaterally claim RM50,000 as their legal cost when this cost had yet to be taxed by the court.

[53] The appellant has enlightened us as to the fact that the judgment sum of USD205,000 in the said summary judgment is secured and paid by the appellant in the following manner:

(i) a sum of RM709,087.60 was paid by the appellant to M/s Vicknaraj, R.D. Ratnam, Rajesh Kumar & Associates, the former solicitors for the appellant on 23 January 2003 and that out of the said sum of RM709,087.60, a sum of RM409,979.40 was paid to solicitors for the 1st respondent;

(ii) the remaining sum of RM300,000 was to be deposited in the joint account of the appellant's former solicitors and the 1st respondent's solicitors;

(iii) on 11 November 2002, the appellant deposited the balance of the judgment sum of RM790,087.60 (a sum of RM470,087.60 and the sum of RM300,000 deposited with the appellant's former solicitors) into court.

[54] In relation to the above, the appellant argued that unless restrained there is a real danger that the 1st respondent, being a foreign company, will remove from jurisdiction the said judgment sum and this would render nugatory any order which the court may order against the 1st respondent. With respect, we find that the appellant has not shown that there is a risk that the assets of the 1st respondent, including the judgment sum will be dissipated.

[55] In relation to the above issue, learned counsel for the 1st respondent pointed out that the instant action is not bona fide and an abuse of the court process. Counsel averred that the appellant only commenced the instant action when it realized that the 1st respondent was entitled to withdraw a sum of RM354,087.60 from the money deposited in court when this court, on 27 November 2002, only allowed stay for an amount of RM470,000. Counsel then argued that the real reason why the appellant filed the instant action is to try to prevent the 1st respondent from enjoying the fruits of its litigation, ie, the said summary judgment. The appellant then tried to stop the 1st respondent from withdrawing the said sum of RM354,087.60 from the court by filing the instant action and the application for Mareva injunction. Counsel submitted this can be clearly seen as the instant action was only filed on 5 February 2003, ie, not long after the above-mentioned decision of this court on 27 November

2002. Counsel then averred that if the appellant really believe that it has a strong case for malicious prosecution against the 1st respondent, it would have filed this action immediately after the said petition was struck off by the court on 16 October 2001.

[56] We had carefully perused the appeal record and the grounds of decision of the learned JC and found that she had taken into consideration all the facts and the legal principles involved in an application for Mareva injunction. She had weighed all relevant factors and came to the conclusion that the balance of convenience lay in favour of refusing the Mareva injunction. We are of the view she had exercised her discretion judiciously and in accordance with settled principles in dismissing this application for Mareva injunction. We cannot find anything to suggest that she has committed an error of law or misconceived the facts. As such we have no reason to interfere.

[57] For the reasons above we dismissed the appeal with costs. The orders made by the learned JC were affirmed. We also ordered that the deposit be remitted to the 1st respondent towards the account of taxed costs.

[58] This was a unanimous decision. My learned brother Denis Ong Jiew Fook, JCA has perused this judgment in draft and has expressed his concurrence with the reasons herein. Our learned brother Arifin Jaka, JCA has since retired when this judgment was prepared and he did not have the benefit of reading it.